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No. 436

In the Supreme Court of the United States

OCTOBER TERM, 1943

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JAMES V. REUTER, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The District Court's findings of fact and conclusions of law (R. 18–23) are reported in 49 F. Supp. 485. The opinion of the Circuit Court of Appeals (R. 27–34) is reported in 137 F. (2d) 315.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 22, 1943 (R. 34). The petition for writ of certiorari was granted on November 22, 1943. The jurisdiction of this Court rests

on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Does the definition of "goods" in Section 3 (i) of the Fair Labor Standards Act, which excludes from its scope "goods after their delivery into the actual physical possession of the ultimate consumer" exempt from the coverage of the Act the handling, packing, and hauling of produce sold by respondent to ship chandlers for delivery to ocean-going ships for consumption during voyages?

2. Are employees of a wholesaler engaged in sorting, selecting, repackaging, and otherwise handling merchandise destined for interstate shipment engaged in the production of goods for commerce within the meaning of the definition of production in Section 3 (j) of the Act, which includes "handling * * * or in any other manner working on such goods"?

3. Was the Circuit Court of Appeals warranted in reversing the District Court's ruling that there was a continuous movement in interstate commerce of out-of-State goods through respondent's place of business to its customers?

4. Where employees' activities relate indiscriminately to interstate and intrastate business, in the absence of proof of the time spent by individual employees in covered work, is it proper in determining whether they are entitled to the bene-

fits of the Act, to measure the substantiality of each employee's interstate activities by dividing the proportion of the employer's business which is interstate by the total number of his employees?

STATUTE INVOLVED

The provisions of the Fair Labor Standards Act[1] primarily involved are:

> SEC. 3 (i). "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.
>
> SEC. 3 (j). "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

[1] Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Sec. 201.

The other relevant provisions of the Act are printed in the Appendix, *infra*, pp. 40–42.

STATEMENT

On January 23, 1942, the Administrator filed a complaint (R. 1–5) against James V. Reuter, Incorporated, alleging that it had failed to pay many of its employees engaged in interstate commerce in accordance with Sections 6 and 7 of the Fair Labor Standards Act and had otherwise violated the Act. Among other things, respondent's answer (R. 17–18) denied that it was engaged in interstate commerce.

The facts as found by the District Court may be summarized as follows:[2] Respondent, a Louisiana corporation, located in New Orleans, is engaged in handling and distributing at wholesale fresh vegetables and fruits (R. 18). It employs 10 to 15 employees, including office help, warehousemen, truck drivers and laborers (R. 18). Approximately 50 percent of the produce handled by respondent is purchased from out-of-State sources (R. 18). Sales are regularly made to out-of-State customers. For the four years from 1939 through 1942, direct out-of-State sales amounted to $58,278 and equalled 5.3 percent of total sales (R. 19). Respondent also regularly sells and delivers "substantial amounts" of veg-

[2] The record on appeal did not include the transcript of the evidence. The findings of the trial court (R. 18–21), therefore, constitute the only factual evidence in the record.

etables and produce to ship chandlers who provision boats for ocean-going voyages (R. 19). These goods, which sometimes are delivered by respondent's employees to the docks, or unloaded on runners, winches or the boats themselves (R. 19–20), are sold by respondent with "every reason to expect" that they will move outside the State (R. 20, 21). The amounts purchased are usually sufficient to last till the boats reach their next port of call (R. 19). Because of their perishable nature, there is a very rapid turnover of the produce and goods handled by respondent (R. 20). In general, all goods from out-of-State sources are received and distributed within a period of one to five days (R. 20).

The produce purchased from other States is usually shipped to respondent by rail in refrigerated freight cars (R. 18). These cars are switched to a siding known as the "Reuter Switch," which is approximately one block from respondent's place of business (R. 18–19). The produce is there unloaded from the cars by respondent's employees and trucked by them to respondent's place of business to be uncrated and examined before being sold (R. 19). At the warehouse respondent's employees sort, select, repackage, and otherwise handle the produce without distinction as to its ultimate destination (R. 19). In addition to shipments to other wholesalers and retailers in Louisiana, each day 12

orders on an average are shipped to out-of-State customers. Usually, respondent's employees load these orders on a Railway Express truck which stops each day at respondent's place of business (R. 19). Produce remaining on hand at the end of the day is temporarily stored overnight in the refrigerated freight cars, yet so rapid is the movement of the produce that the freight cars are "always fully unloaded and released within two to five days after arrival" (R. 20).

The District Court held (1) that employees engaged in unloading produce coming from out-of-State sources and employees engaged in preparing and shipping orders to out-of-State customers and to ship chandlers for provisioning oceangoing vessels were engaged in commerce within the meaning of Sections 6 and 7 of the Act (R. 21); (2) that employees who, without regard to the final destination thereof, sorted, picked over, packaged, repackaged, and otherwise handled produce, part of which was regularly shipped outside the State, "spent a substantial portion of their time working on such goods which did move outside the State" and were engaged in the production of goods for commerce within the meaning of Section 3 (j) of the Act (R. 21); and (3) that because of the rapidity in turn-over of goods received from out-of-State sources and because of respondent's method of handling them, "there was a continuity of movement of such goods" from out-of-State to re-

spondent's customers, whether local or distant; that the activities of all of respondent's employees were "an integral part of that movement"; and that therefore such employees were engaged in commerce within the meaning of the Act (R. 21–22). An injunction was issued restraining further violations of the minimum wage, overtime, and record-keeping provisions of the Act (R. 23–24).

On appeal, the Circuit Court of Appeals reversed and remanded the case on the grounds (1) that the delivery of goods to ships for consumption on interstate or foreign journeys was to the "ultimate consumer," and that therefore the preparation, handling, and delivery of such goods sold by respondent to ship chandlers were excluded from the Act by Section 3 (i) (R. 30–31); (2) that the lower court erred in holding that the sorting, repackaging, and handling of goods constituted production of goods under the Act (R. 30); (3) that the lower court was in error in failing to rule that the produce had come to rest and that the interstate movement ended at respondent's premises (R. 31–32); and (4) that interstate sales to the extent of 5 percent would not suffice to establish coverage in the absence of additional proof that particular employees spent a substantial portion of their time working on these interstate shipments, because if this 5 percent were equally divided among all employees the fractional percentage of the employer's busi-

ness performed by each employee would be too trifling to justify injunctive relief (R. 32–33).[3]

Judge Holmes dissented on the ground that there was nothing in the record to impugn the lower court's ruling (which he termed a finding of fact) "that such was the rapidity of movement and the method of handling of goods purchased from outside the State that each such transaction was a continuous and unbroken shipment in interstate commerce from without the state through appellant into the hands of its customers", and that, upon this finding, the court correctly held "that all of appellant's employees were an integral part of that interstate movement and were therefore engaged in commerce under the Act" (R. 33–34).

SPECIFICATION OF ERRORS.

Each of the errors set forth in the petition for writ of certiorari will be urged:

1. The court erred in ruling that Section 3 (i) of the Act excludes from the Act the preparation, handling, and delivery of goods to ship chandlers or ships for consumption on interstate or foreign journeys.

2. The court erred in ruling that the sorting, repackaging, and handling of goods does not

[3] The Court of Appeals conceded that "truck drivers and their helpers when engaged in unloading produce from freight cars coming from out of the State and when engaged for a substantial part of their time in hauling such produce from freight cars to defendant's place of business" are covered by the Act (R. 29).

constitute production of goods for commerce within the meaning of the Act.

3. The court erred in reversing the District Court's ruling that the goods received by respondent from out-of-State sources do not come to rest and end their interstate journey at respondent's premises, but that, because of the rapidity of movement, and because of respondent's method of handling the goods, there is a continuity of movement from the out-of-State sources to respondent's customers.

4. The court below erred in ruling that sales admittedly interstate, comprising 5 percent of respondent's total sales, would not suffice to establish coverage in the absence of additional proof that particular employees spend a substantial portion of their time working on such interstate sales.

SUMMARY OF ARGUMENT

I

The Court of Appeals erred in ruling that the exception in Section 3 (i) warranted disregard of respondent's sales to ship chandlers in the determination of coverage. Section 3 (i) provides that the term "goods" does not include goods *after* their delivery to the ultimate consumer; this does not exclude goods prior to their delivery to the consumer while they are being handled by respondent's employees.

II

The Court of Appeals erred in ruling that the sorting, handling, and packaging of goods to be shipped in interstate commerce does not constitute "production of goods" for commerce within the meaning of the Act. Section 3 (j) defines "production of goods" to include "handling, * * * or in any other manner working on such goods". Respondent's employees, in sorting, selecting, packaging, and handling produce, were certainly "handling" and otherwise "working on such goods."

III

In reversing the District Court's ruling that the goods received from out-of-State sources continued their interstate movement through respondent's premises to respondent's customers, the Court of Appeals misapplied, we believe, this Court's decisions in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, and *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572. As Judge Holmes pointed out in his dissent below, the District Court's decision constituted in reality a finding of fact "that such was the rapidity of movement and the method of handling of goods purchased from outside the state that each such transaction was a continuous and unbroken shipment in interstate commerce from without the state through appellant [respondent] into the hands of its customers." "There is nothing in the record to show that it [this finding] is untrue

as a matter of fact." (*Ibid.*) Commerce is not a technical legal conception, but a practical one, drawn from the course of business. The facts in the record with respect to the rapidity of movement of the produce and respondent's method of handling the merchandise affirmatively support the District Court's conclusion. Just as the petitioner in *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572, failed to maintain the burden of showing error in the conclusion of the lower court that there was no continuity of interstate movement there, so the respondent in this case has failed to show error in the trial court's judgment that there *was* actual continuity of interstate movement here.

IV

The formula applied by the Court of Appeals, whereby it concluded that although 5 percent of respondent's sales were admittedly in interstate commerce, each individual employee's interstate activity would be too trifling to invoke the court's injunctive processes, is plainly fallacious and would result in the unwarranted exclusion of numerous employees from the benefits of the Act.

Likewise untenable is the ruling of the Court of Appeals that the application of the Act should be conditioned upon specific proof that particular employees spent a substantial portion of their time in the interstate activities. Not only is this unworkable, but it is subversive of the purposes of the Act. *United States* v. *New York Cent.*

R. R., 272 U. S. 457, 464; *United States* v. *Darby*, 312 U. S. 100, 117–118. The only practical method for determining the applicability of the Act to employees whose interstate and intrastate duties are commingled is the method outlined by the Fourth Circuit in the case of *Guess* v. *Montague*, 6 Wage Hour Rept. 934, where it was held that a prima facie showing of coverage of employees is made when it appears that the employees worked on interstate as well as intrastate business and that the two classes of business were commingled in the employer's operations; that the burden is then upon the employer to produce evidence that particular employees "did not render any service in connection with its interstate business" (at p. 935).

ARGUMENT

The District Court relied upon three independent grounds of coverage, each of which taken separately, the Government contends, is sufficient to support the conclusion that a substantial amount of the employees' time was devoted to interstate activities within the coverage of the Act. The three grounds of coverage relied upon were as follows: (1) the unloading of interstate shipments and the preparation of goods for interstate shipments constitute interstate commerce; (2) the preparation (including sorting, selecting, handling, packaging, and repackaging) of goods, a substantial part of which are regularly shipped

outside the State in the ordinary course of business, also constitutes "production" of goods for commerce within the Act; and (3) because of the rapidity of movement of the extrastate goods through respondent's place of business to its customers and because of respondent's method of handling such goods, the interstate commerce was continuous from the out-of-State sources until the goods reached respondent's customers, whether local or distant.

The Court of Appeals rejected the second and third grounds of coverage, and ruled that none could be predicated upon the preparation and delivery of goods to ships or ship chandlers, because of the definition of "goods" in Section 3 (i). Application of the first ground of coverage, according to the Court of Appeals, was dependent upon proof that particular employees spent a substantial portion of their time in the covered activities.

I

THE ACT IS APPLICABLE TO EMPLOYEES ENGAGED IN THE PREPARATION, HANDLING AND DELIVERING OF PRODUCE TO SHIP CHANDLERS FOR CONSUMPTION ON OCEAN-GOING VESSELS NOTWITHSTANDING THE EXCLUSIONARY CLAUSE IN SECTION 3 (i)

The District Court found that respondent sells substantial amounts of produce to ship chandlers for provisioning ocean-going vessels moving outside of the State of Louisiana. Various of respondent's employees are engaged in preparing

this produce, handling the orders, and sometimes transporting the produce to the loading docks or on board the ships in the New Orleans harbor. The District Court concluded that employees performing these activities were covered by the Act (R. 21). Although there are somewhat casual remarks in the majority opinion which suggest the contrary,[4] it seems unlikely that the circuit court of appeals seriously questioned the interstate character of these transactions. Certainly it is too late to deny that the business of selling merchandise within a State for transportation beyond the State is interstate commerce. – *Currin* v. *Wallace*, 306 U. S. 1, 10; *Hamlet Ice Co.* v. *Fleming*, 127 F. (2d) 165 (C. C. A. 4), certiorari denied, 317 U. S. 634;[5] *Atlantic Co.* v. *Walling*, 131 F.

[4] The court noted, for example, that provisions for the vessel "might be consumed in port" since a "member of the crew could eat and get shore leave, or desert the ship" or "could subsist on food other than that sold by defendant" (R. 31).

[5] In the *Hamlet Ice* case the Circuit Court of Appeals for the Fourth Circuit narrowly circumscribed the force of its earlier decision in *Winslow* v. *Federal Trade Comm.*, 277 Fed. 206, certiorari denied, 258 U. S. 618, which had reached a contrary result with reference to sales to ship chandlers. The court indicated that the *Winslow* case was not applicable to questions as to the scope and application of the Fair Labor Standards Act. In the *Hamlet Ice* case, it was held that employees supplying ice within a State for refrigerating railroad cars in which perishable produce was transported outside of the State were entitled to the benefits of the Act. Pointing out that there the movement of the ice was a "*sine qua non*" to the movement of the produce, the court below held that the decision was inapplicable to a movement

(2d) 518 (C. C. A. 5). The interstate character of these activities is equally apparent if respondent's employees are regarded as engaged in producing goods for commerce. *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88; *Enterprise Box Co.* v. *Walling*, 125 F. 2d) 897 (C. C. A. 5), certiorari denied, 316 U. S. 704; *Atlantic Co.* v. *Walling*, 131 F. (2d) 518 (C. C. A. 5).[6]

The circuit court of appeals held that respondent's sales to the ship chandlers should be disregarded in determining the coverage of the Act because of the exclusionary language in Section 3 (i), which provides that the term "goods" "does not include goods *after* their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof". [Italics supplied.] Regarding the vessels and their crews as the ultimate consumers of the produce, the court seemingly held that respondent's employees were not handling "goods" for commerce within the meaning of the Act.[7]

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of produce not shown to be indispensable to the movement of the vessels in their ocean voyages (R. 31). This novel suggestion is supported neither by the language of the Act nor by the decisions of this Court.

[6] This question is more fully discussed in point II, *infra*.

[7] Employees may be engaged "in commerce" under the Act without handling or working on "goods." See the definition of "commerce" in Section 3 (b). The word "goods" is not used in defining the applicability of Sections 6 and 7 to employees so engaged "in commerce." For these reasons, it

This reading of Section 3 (i) has been rejected by every circuit court of appeals which has ruled on the matter, including the Fifth Circuit in two earlier cases. *Enterprise Box Co.* v. *Walling,* 125 F. (2d) 897 (C. C. A. 5), certiorari denied, 316 U. S. 704; *Atlantic Co.* v. *Walling,* 131 F. (2d) 518 (C. C. A. 5); *Hamlet Ice Co.* v. *Fleming,* 127 F. (2d) 165 (C. C. A. 4), certiorari denied, 317 U. S. 634; *Chapman* v. *Home Ice Co.,* 136 F. (2d) 353 (C. C. A. 6), certiorari denied, No. 307, this Term, 64 S. Ct. 72. Uniformly, it has been recognized, as the language of the statute requires, that the exclusionary clause applies only "after" goods are delivered to the ultimate consumer, at which point it operates to exempt the ultimate consumer from possible liability under Section 15 (a) (1) for transporting so-called "hot goods." If the ships provisioned with respondent's produce are the ultimate consumers thereof, the produce nevertheless constituted "goods" within the meaning of the Act until it was delivered to the ships. Because of Section 3 (i), the produce may *then* have ceased to be "goods"; this does not mean that it was not "goods" when respondent handled it and sold it to the ship chandlers. As the Circuit Court of Appeals for the Sixth Circuit pointed out in

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would seem that the interpretation and application of Section 3 (i) made by the circuit court of appeals can be predicated only upon the assumption that the activities in question constitute "production of goods for commerce" as distinguished from activities "in commerce."

Chapman v. *Home Ice Co., supra,* at 355, the clause "exempts the ultimate consumer from the penalty of section 15 (a) (1), and has no effect in limiting the scope of the Act as to the producers of goods intended for shipment in interstate commerce".

II

EMPLOYEES OF A WHOLESALER WHO SORT, HANDLE, PACKAGE, AND DELIVER GOODS FOR SHIPMENT BEYOND THE STATE ARE ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE WITHIN THE MEANING OF THE ACT

Section 3 (j) of the Act provides that "for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, *handling,* transporting, *or in any other manner working on such goods,* or in any process or occupation necessary to the production thereof, in any State". [Italics supplied.] The activities of respondent's employees in preparing goods for shipment to customers clearly constitute "handling" and "working on" goods within the plain meaning of those terms. The Court of Appeals, without giving its reasons, stated that it disagreed with the conclusion of the lower court that the employees were engaged in production of goods for commerce. Apparently, the Court of Appeals felt that the ordinary meaning of the word "production" would not include handling in the course of wholesale

distribution. But, whatever the normal connotation of the word "production," its meaning in the Act is controlled by the statutory definition which Congress supplied in Section 3 (j). There might be force in the position of the Court of Appeals, as this Court pointed out in the case of *Fox* v. *Standard Oil Co.*, 294 U. S. 87, "if the statute had left the meaning of its terms to the test of popular understanding. Instead, it has attempted to secure precision and certainty * * * supplying its own glossary. * * * In such circumstances definition by the average man or even by the ordinary dictionary * * * is not a substitute for the definition set before us by the lawmakers * * *" (at pp. 95, 96).

The decisions interpreting the Act have uniformly recognized that the statutory definition of "production" goes beyond the ordinary sense of the word and includes handling and working on goods apart from the manufacturing processes. The Fourth Circuit, in the case of *Bracey* v. *Luray*, 138 F. (2d) 8 (C. C. A. 4), where employees were engaged in the sorting, cutting, and loading of scrap iron, activities comparable to the handling of the produce by employees in the instant case, held that such handling of scrap iron constituted "production" within the meaning of the Act since " 'handling' is by express terms included in 'production' " (at p. 11). Similarly, in *Fleming* v. *Kenton Loose Leaf Tobacco Ware-*

house Co., 41 F. Supp. 255 (E. D. Ky.),[8] the court held (pp. 256–257):

> A warehouse is not a producer in the ordinary sense of the word.
>
> * * * * *
>
> It is, however, a handler of a product moving in interstate commerce and thereby comes squarely within the definitions of "producer" as defined by Section 3(j).

See also *Philips* v. *Star Overall Dry Cleaning Co.*, 7 Wage Hour Rept. 92 (S. D. N. Y., 1944). The same conclusion was reached in applying the statutory definition to the child labor provisions of the Act in the recent case of *Lenroot* v. *Western Union Tel Co.*, 32 F. Supp. 142, 149 S. D. N. Y.).

As noted above, the Court of Appeals suggested no reason at all for departing from the plain language of the statutory definition. Respondent argued in its brief in opposition to the petition for certiorari that the words "handling or in any other manner working on" refer only to "such handling as is necessary to the production of goods for commerce" (br. in opp. to pet., p. 10), apparently using the word "production" in the sense of strictly manufacturing processes. This argument obviously reads the words "handling," etc. out of the statute. There is nothing in the statutory language or purpose to indicate that the word "handling" is subordinate to or

[8] In this case the tobacco warehouse employees weighed the tobacco and placed it in baskets according to grade.

qualified by the words "manufacturing" or "mining"; all three words have equal stature in the definition.

Respondent also suggests that the handling and transportation of goods cannot constitute production, since if this is so activities constituting interstate commerce would also constitute production of goods for commerce (*id.*, at 9). But no reason appears why an activity may not come within both categories of coverage. On the face of the statute, it is apparent that the definition of these terms are not mutually exclusive; it is to be expected that the terms will frequently overlap. Nothing in the legislative history or in the Congressional purpose warrants the restrictive interpretation of the broad definitional language which the Court of Appeals adopted.

The view that activities of this character come within the statutory definition of production not only follows the language of the statute, but also carries out the purpose of the Act (Section 2 (a)) to prevent interstate commerce from being employed as "the instrument of competition in the distribution of goods produced under substandard labor conditions". See *United States* v. *Darby*, 312 U. S. 100, 115. Low wages paid for sorting, packaging, or otherwise handling goods affect the cost of products shipped in interstate commerce, and obviously have the same competitive effect as low wages paid for the processing or manufacturing of goods. Thus, substandard labor

conditions can be as effectively spread and perpetuated among the workers of the several States by underpayment of workers engaged in handling goods as by underpayment of workers engaged in the strictly manufacturing processes. (See Section 2 (a) (1).)

We submit, therefore, that the Court of Appeals erred when it rejected the District Court's ruling that employees of respondent who sorted, picked over, handled, packaged and repackaged produce were engaged in the production of goods for commerce (R. 21). The produce handled included not only produce sold and directly shipped by respondent to out-of-State customers (an average of 5.3 percent for the four years 1939–1942 inclusive, ranging from 4.2 percent in 1942 to 8.0 percent in 1940 (R. 19)), but also the "substantial amounts" bought from respondent by ship chandlers for the avowed purpose of provisioning vessels for ocean-going voyages (R. 19 and 21). Respondent's employees handled all the produce indiscriminately, "without regard to the final destination thereof" (R. 21). Whether or not they were engaged "in commerce" (see points I and III), they were nevertheless covered by the Act because they were "engaged in the production of goods for commerce." The part of their activities which related to goods destined for movement in interstate commerce was obviously a "substantial part" thereof; hence the fact that they also

"produced" goods for intrastate commerce does not defeat coverage (see Point IV, *infra*).

III

THE CIRCUIT COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT'S RULING THAT THERE WAS A CONTINUOUS MOVEMENT IN INTERSTATE COMMERCE OF OUT-OF-STATE GOODS THROUGH RESPONDENT'S PLACE OF BUSINESS TO ITS CUSTOMERS

As an additional and separate ground for holding respondent's employees to be engaged "in commerce" and therefore subject to the Act, even if none of the produce had been sold by respondent for shipment out of the State, the District Court held that because of the rapidity of movement of the merchandise received from out of the State and because of respondent's method of handling it, there was a continuity of movement of such goods through respondent's premises to its customers (R. 21). This ruling was based upon the following facts:[9] Respondent's out-of-State purchases of fruits and vegetables are shipped in refrigerated freight cars which are shunted to respondent's siding (R. 18–19). From here, that part of the produce which is immediately unloaded is brought to respondent's premises, one block away, where it is examined, sorted,

[9] The record on appeal contained only the pleadings and the findings and conclusions of the District Court. Respondent, who was the appellant below, did not designate or transmit any portion of the evidence. Thus the factual evidence in the record consists solely of the findings of the District Court.

selected, packaged, and handled, without distinction as to its ultimate destination (R. 19). The bulk of the produce is then rapidly sold and delivered to respondent's customers, who comprise both local and out-of-State wholesalers and retailers, as well as ship chandlers (R. 19–20). The refrigerated freight cars in which goods are received are used as a temporary overnight storage place for produce not sold at the end of the first day (R. 20). The freight cars are always fully unloaded and released within two to five days after arrival (R. 20). In general, all goods received from out-of-State sources are unloaded and pass through respondent's premises on to the customers within one to five days after receipt by respondent (R. 20).

The Court of Appeals reversed this ruling of the District Court on the ground that the merchandise necessarily came to rest at respondent's place of business because the produce could not be examined, sorted, etc., "on the run" and "buyers must be found willing to buy", and "these miscellaneous tasks are time consuming and are inconsistent with the continuity of movement" (R. 32). We submit that the Court of Appeals, in so ruling, failed to give effect to the practical principles laid down in this Court's decision in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, and *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572.

The *Jacksonville Paper Company* case involved

the applicability of the Fair Labor Standards Act to branch houses, of a wholesaler of paper products and related articles, which, though constantly receiving merchandise on interstate shipments and distributing it to their customers, did not ship or deliver any of it across state lines.[10] The District Court held that none of the employees in these branch houses was subject to the Act. The Court of Appeals reversed, holding that where goods procured from out of the State to fill a customer's order are shipped interstate with intent that they be, and they are, carried at once to that customer, the whole movement is interstate.[11] This Court, in response to the Administrator's contention that under the decision below any pause at the warehouse was sufficient to end the interstate journey, said: "a break in [the] physical continuity of transit is not controlling" (317 U. S., at 569), and "The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act" (317 U. S., at 568).

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[10] It was conceded by the employer in that case that those of its warehouses which did distribute across state lines were subject to the Act, 317 U. S., at 565.

[11] The Court of Appeals also held that those employees who procured or received the goods from other States were "engaged in commerce" and covered by the Act.

Viewing it as "clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce" (317 U. S., at 567), the Court adopted as a starting point for the inquiry whether a business is "in commerce" within the meaning of the Act, the statement in *Swift & Co. v. United States*, 196 U. S. 375, 398, that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business" (317 U. S. at 570).

Applying this principle, the Court held that the "practical continuity of movement of the goods" required to make their whole journey from out-of-State sources through a wholesaler's warehouse to his customers interstate in character was sufficiently shown when the goods were ordered by the wholesaler pursuant to a preexisting contract or understanding with the customer (317 U. S., at 568–569).

Nothing in the opinion in the *Jacksonville Paper Company* case indicates that a trial court's conclusion that the requisite "practical continuity of movement" existed must be reversed in the absence of such preexisting contracts or understandings. The Court said merely that in the case before it, as to transactions not involving such contracts or understandings, "we do not think the Administrator has sustained the burden which is on a petitioner of establishing error in a judgment

which we are asked to set aside" (317 U. S. at 569–570). The opinion explicitly stated that the Court did not mean to imply that "practical continuity in transit" could not be established at times by "a wholesaler's course of business based on anticipation of needs of specific customers, rather than on prior orders or contracts". It did refuse to set aside the judgment below with respect to certain transactions as to which there was evidence only that most of the wholesaler's customers formed a fairly stable group whose orders were recurrent so that the wholesaler could estimate with considerable precision the needs of his trade. But it based this refusal, not upon the absence of prior contracts or understandings, but upon the fact that the evidence lacked "that particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local disposition" (317 U. S., at 570).

Since "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business," we submit that, although the District Court characterized its ruling as a "conclusion of law" (R. 21), Judge Holmes was fundamentally right when he said in his dissenting opinion in the Court of Appeals (R. 33) that the District Court "*found as a fact* that such was the rapidity of movement and the method of handling of goods purchased from out-

side the State that each such transaction was a continuous and unbroken shipment in interstate commerce from without the State through [respondent] into the hands of its customers." [Italics supplied.]

As Judge Holmes also said, the ruling of the District Court that there was continuity of interstate movement "is not erroneous as a matter of law and there is nothing in the record to show that it is untrue as a matter of fact" (R. 33). Goods do not necessarily come to rest because their interstate movement is interrupted to find buyers. See *Swift & Co.* v. *United States;* 196 U. S. 375, 398–399 where the Court said:

> When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce.

That the goods entered the respondent's warehouse and were handled there does not suffice to establish that they then "came to rest." The trial court's findings setting forth respondent's methods of handling the produce show that the goods obviously did not become "commingled with the

mass of property within the State * * * held solely for local disposition and use". *Schechter Corp.* v. *United States*, 295 U. S. 495, 543. Respondent's activities are comparable, not to those of the Schechter Corporation, but to those of the "receivers" from whom that corporation purchased poultry. In the *Schechter* case the Court declared that the interstate commerce continued through the sale by the "receivers" and until delivery to the purchasers' slaughterhouses (pp. 542–543).

Higgins v. *Carr Bros. Co., supra,* involved the applicability of the Fair Labor Standards Act to a wholesale fruit, produce, and grocery business. The decision below, denying coverage, was affirmed by this Court because there was nothing in the record to support petitioner's claim of "an actual or practical continuity of movement of merchandise from without the state to respondent's regular customers within the state", and petitioner had not maintained the burden of showing error in the judgment below. Here, there is nothing in the record to impeach the correctness of the District Court's ruling that there was an actual continuity of movement in this case.

On the contrary, the facts in the record with respect to the rapidity of movement of the produce and respondent's method of handling the merchandise affirmatively support the District Court's decision. The commodities moved rapidly

through respondent's place of business, being unloaded, sorted, packaged, and shipped from respondent's premises, all within one to five days after receipt by respondent; so rapid was the movement that respondent used the refrigerated freight cars in which the goods were received as a storage place, and respondent's produce was not placed on the shelves of a store to be "there held solely for local disposition and use" (see *Schechter Corp.* v. *United States,* 295 U. S. 495, 543), nor did it become part of the stock in trade "held by a local merchant for local disposition" (*Walling* v. *Jacksonville Paper Co.,* 317 U. S. at 570).

We submit, therefore, that even if no substantial part of respondent's produce had been sold by it for shipment out of the State, its employees would nevertheless be covered by the Act as "engaged in commerce" within the rule of the *Jacksonville Paper Company* case.

IV

THE RULING OF THE COURT BELOW ON THE METHOD OF DETERMINING THE SUBSTANTIALITY OF INDIVIDUAL EMPLOYEES' INTERSTATE ACTIVITIES IS UNTENABLE AND WOULD DEFEAT THE PURPOSES OF THE ACT

The District Court found that, in addition to the "substantial amounts" of goods sold to ship chandlers for shipment outside the State, respondent regularly shipped directly to out-of-State customers five percent of its sales, and that respondent's

employees worked on all goods indiscriminately without distinction as to their ultimate destinations (R. 19). Since these interstate sales constituted a regular part of respondent's business and were not inconsequential or sporadic, they clearly suffice to bring respondent within the coverage of the Act, even if respondent's sales in Louisiana are held not to be interstate in character under the rule of the *Jacksonville Paper Company* case. As this Court pointed out in its first decision interpreting the Fair Labor Standards Act, Congress, in this Act, "has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer": *United States* v. *Darby*, 312 U. S., at 123.[12]

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[12] For lower court decisions under the Act applying this principle see *Schmidt* v. *Peoples Telephone Union of Maryville*, 138 F. (2d) 13 (C. C. A. 8); *Chapman* v. *Home Ice Co.*, 136 F. (2d) 353 (C. C. A. 6); *Sun Pub. Co.* v. *Walling*, 7 Wage Hour Rept. 115 (C. C. A. 6, 1944); *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn.); *McKeown* v. *So. Calif. Freight Forwarders*, 6 Wage Hour Rept. 1016 (S. D. Calif.) 1943; *Brown* v. *Minngas*, 51 F. Supp. 363 (D. Minn.); *Ling* v. *Currier Lumber Co.*, 50 F. Supp. 204 (E. D. Mich.); *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.); *Lewis* v. *Nailling*, 36 F. Supp. 187 (W. D. Tenn.); *Steger* v. *Beard & Stone Elec. Co.*, 4 Wage Hour Rept. 411 (N. D. Tex. 1941); *Nelson* v. *Southern Ice Co.*, 4 Wage Hour Rept. 562 (N. D. Tex. 1941); *Berry* v. *34 Irving Place Corp.*, 6 Wage Hour Rept. 1229 (S. D. N. Y., Nov. 24, 1943); *Philips* v. *Star Overall Dry Cleaning Co.*, 7 Wage Hour Rept. 92 (S. D. N. Y., Jan. 6, 1944).

The Circuit Court of Appeals, although conceding that "manifestly some of the employees are engaged in interstate commerce" (R. 33), ruled that the lower court's injunction could not be sustained because it did not appear which particular employees spent a sufficiently substantial portion of their time in interstate activities to bring them within the coverage of the Act. Apparently the Court of Appeals had in mind this Court's statement in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 571–572, that "If a substantial part of an employee's activities" related to interstate transactions, the employee is covered by the Act. We do not believe, however, that this statement can be construed as requiring or suggesting any such methods of determining coverage as those advanced by the Court of Appeals in the instant case. We submit that in the circumstances of this case, where the trial court found the employer's business to include regular and substantial interstate business, and the employees to be engaged indiscriminately in the interstate and intrastate activities, no further showing of coverage was necessary to support the injunction issued by the District Court.

In reversing the District Court's judgment, the court below ruled that, if the functions in connection with respondent's interstate sales were equally handled by all the ten to fifteen employees, the interstate activity of each employee

would affect only a fraction of one percent of respondent's business, and "since the court is not concerned with trifles its injunctive processes would hardly be called forth" (R. 33). Determination of the applicability of the Act upon the basis of any such calculation would produce startling results in obvious conflict with the meaning and purpose of the Act. For example, if the court's reasoning were applied to an employer doing 100 percent interstate business with 1,000 employees, the interstate activities of each employee would relate to only one-tenth of one percent of the employer's interstate business, according to Circuit Judge Waller's mathematics, and no employee would be subject to the Act. The practical effect of this suggested method of determining the substantiality of time spent on interstate business would be to exclude from the benefits of the Act virtually all employees whose interstate and intrastate duties are commingled. Plainly the test must relate to the proportion of employee time spent on interstate activities, and not the proportion of the employer's interstate business on which each employee works.

We think it obvious that the time spent by all an employer's employees as a group on his interstate activities must bear substantially the same relation to their total time as the employer's interstate business bears to his entire business. In the absence of a showing to the contrary, the

normal presumption would be that each employee spends approximately that proportion of his time on the interstate activities. See pp. 36–38, *infra*. In this case, five percent plus a "substantial amount" of the employer's business is definitely subject to the Act (see Points I and II), and it is upon this basis that the applicability of the Act to the respondent must be determined.

The opinion's mathematics suggests that none of respondent's employees would be covered unless he worked on interstate activities a much larger proportion of time than the average employee (R. 32–33). But even if the showing required were only as to the proportion of his time which each employee actually spent on goods in or destined for interstate commerce—and the opinion seems confused as to this—the opportunity would be little more than "a teasing illusion." (*Edwards* v. *California*, 314 U. S. 160, 186.) For when an employee in a factory or warehouse handles commingled goods, some of which will move interstate, neither he nor anyone else will ordinarily know, when he is handling them, whether the particular goods on which he is working will be shipped to interstate or intrastate customers. Even after the shipment has been made, it will be impossible—except in the very simplest situations—to trace it back to the individual employee. Thus, if the fact that a substantial part of an employer's business is inter-

state is insufficient to show that some[13] of his employees are subject to the Act, the burden on any one attempting to enforce the Act would be insuperable where interstate and intrastate activities are commingled.

This Court has recognized the impracticability of conditioning the application of the Act upon the segregation of the interstate business. *United States* v. *Darby*, 312 U. S. 100, 117–118. See also *United States* v. *New York Central R. R.*, 272 U. S. 457, 464. In the case of most wholesalers distributing some of their merchandise in interstate commerce, as in the case of "most manufacturing businesses shipping their product in interstate commerce" (see *United States* v. *Darby, supra,* at 117–118), employees' activities relate indiscriminately to both interstate and intrastate commerce. "An interpretation of the statute which would in practice require segregation of all shipments in interstate commerce" would make enforcement of the Act impossible in numerous cases and would "defeat the purpose of the Act." (See *United States* v. *New York Central R. R., supra,* at p. 464.) Rejecting a comparable suggested interpretation of the Hours of Safety Act, this Court, in *Baltimore & Ohio R. R.*

[13] If some employees worked on interstate goods less than the employer's average, the figure for other employees would have to be greater than the average. The opinion below apparently holds no one subject to the Act unless it is shown that the percentage of time spent by individual employees on interstate activities is greater than the average.

v. *Interstate Commerce Commission*, 221 U. S. 612, 619, speaking through Mr. Justice Holmes, declared that the purpose of Congress "cannot be defeated either by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations."

The view that the employer might relieve himself of responsibility under the Fair Labor Standards Act by commingling the interstate and intrastate duties of his employees had its origin in the decision of the Fifth Circuit in the case of *Super-Cold Southwest Co.* v. *McBride*, 124 F. (2d) 90, a suit instituted by an employee. The court there suggested that where the employee's duties were commingled, his recovery was conditioned upon his pointing out "what part of his work was in intra- and what part in inter-state commerce" (at p. 92). This suggestion has been followed, with serious consequences to the enforcement of the Act, by district courts within the Fifth Judicial Circuit, although it has been generally rejected elsewhere.[14] As one court re-

[14] The following cases are typical but by no means exhaustive of those in which the doctrine is disapproved: *Guess* v. *Montague*, 6 Wage Hour Rept. 934 (C. C. A. 4, 1943); *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. (2d) 655 (C. C. A. 10); *Bowie* v. *Gonzalez*, 117 F. (2d) 11 (C. C. A. 1); *Calaf* v. *Gonzalez*, 127 F. (2d) 934 (C. C. A. 1); *Johnson* v. *Phillips-Buttorff Mfg. Co.*, 5 Wage Hour Rept. 112 (Ch. Ct. Tenn. 1942), affirmed, 160 S. W. (2d) 893 (Tenn. 1942), certiorari denied, 317 U. S. 648; *Ashenford* v. *L. Yukon &*

cently commented upon this doctrine, "To impose such a burden upon the employee in such a case [where his interstate activities are not segregable] is effectively to deny him the relief contemplated by the statute." *Berry* v. *34 Irving Place Corp.*, 6 Wage Hour Rept. 1229, 1230, (S. D. N. Y., 1943).[15] And district courts in the Fifth Circuit, in applying the doctrine, have described the burden thus imposed upon employees as "impossible" (*Tucker* v. *Hitchcock,* 44 F. Supp. 874, 879 (S. D. Fla.)); as requiring more than a "Herculean" effort (*Monk* v. *Continental Baking Co.*, 5 Wage Hour Rept. 205, 206 (N. D. Tex. 1942)); and as "an unspeakable burden, almost" (*Moore* v. *Perkins Dry Goods Co.*, 5 Wage Hour Rept. 168, 169 (N. D. Tex. 1942)).

The only practical method for determining the applicability of the Act to employees whose interstate and intrastate duties are commingled is the method outlined by the Fourth Circuit in the case

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Sons, 172 S. W. (2d) 881, 887–888 (Kans. City Mo. Ct. of App.); *Crompton* v. *Baker*, 220 N. C. 52, 16 S. E. (2d) 471 (1941); *Gaskin* v. *Clell Coleman and Sons*, 5 Wage Hour Rept. 581 (C. C. Ky. 1942); *Berry* v. *34 Irving Place Corp.*, 6 Wage Hour Rept. 1229, 1230 (S. D. N. Y., 1943).

[15] The Fifth Circuit's opinion in the *Super-Cold* case, *supra*, also suggested that the employee must further segregate his overtime from his regular time, and show what part of his overtime was in interstate commerce. With respect to this suggestion Judge Rifkind said: "I cannot bring myself to assent to such a proposition. Nowhere in the statute do I find a warrant for such a rule," *Berry* v. *34 Irving Place Corp.*, *supra*, 6 Wage Hour Rept. at 1230.

of *Guess* v. *Montague*, 6 Wage Hour Rept. 934, which appears to be the method impliedly recognized in this Court's decision in the *Darby* case. This method is based upon the natural assumption that where covered and non-covered work is commingled, the fraction of each employee's time devoted to covered work is the same as the fraction of all the work which constitutes covered work.[16] The Fourth Circuit ruled that a prima facie showing, entitling the employee to the protection of the Act, is made where it appears that the employee worked on interstate as well as

[16] A like approach to coverage under the Wagner Act was taken by the Circuit Court of Appeals for the Second Circuit in *National Labor Relations Board* v. *Van Deusen*, 138 F. (2d) 893. Respondent there operated a "contract shop," processing materials furnished by Tiny Town Togs, Inc., into garments which, after further processing by it, were distributed to its customers. It was stipulated that 80 percent of the cloth used by Tiny Town was purchased outside the state and that 90 percent of its total sales were to out-of-state buyers. Respondent argued that, in view of the small proportion of the total Tiny Town work done by him, it was quite possible for all the raw materials used by him to have come from within the State and for all the garments processed by him to have been sold within the State. The Court of Appeals rejected this argument, Judge Clark saying: "But the stipulation of the parties cannot properly be thus construed. Its reasonable interpretation, as well as the natural assumption from the circumstances—no attempt at separation of the interstate and intrastate elements by Tiny Town being suggested—is that the materials received and garments delivered by respondent, however small a part of Tiny Town's total business, represented the same division of materials received from or delivered without the state as did that total business" (138 F. (2d), at 894).

intrastate business and that the two classes of business were commingled in the employer's operations; and that the burden is then upon the employer to produce evidence that certain employees "did not render any service in connection with its interstate business" (6 Wage Hour Rept. at 935). See also Interpretative Bulletin No. 1, par. 5, 1942 Wage Hour Man. 24; Interpretative Bulletin No. 5, par. 9, 1942 Wage Hour Man. 28. Where, as in the instant case, the employer produces no such evidence, and his interstate business is not spasmodic or trifling in amount, but constitutes "a continuous, regular and integral part" of his normal business,[17] a sufficient showing of coverage has been made.[18]

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[17] See *McKeown* v. *So. Calif. Freight Forwarders*, 6 Wage Hour Rept. 1016, 1017 (S. D. Calif. 1943), holding the Act applicable to freight checkers where 7 percent of defendant's business was interstate.

[18] See also *Schmidt* v. *Peoples Telephone Union of Maryville*, 138 F. (2d) 13 (C. C. A. 8), holding the Act applicable to switchboard operators, where only a fraction of one percent of the company's revenue was derived from interstate calls; *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn.), holding the Act applicable to telephone operators where 4 percent of the calls were interstate; *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.), holding the Act applicable to an employee of an elevator manufacturing and repair company whose interstate business amounted to 3/8 of one percent of the company's total business; *Philips* v. *Star Overall Dry Cleaning Co.*, 7 Wage Hour Rept. 92 (S. D. N. Y. 1944), holding the Act applicable to an employee of a commercial laundry, 5 percent of whose business was interstate; *Chapman* v. *Home Ice Co.*, 136 F. (2d) 353 (C. C. A. 6), holding the Act applicable to em-

CONCLUSION

The ruling of the Court of Appeals on each question is erroneous. Its decision should be reversed and the decision of the District Court reinstated.

Respectfully submitted.

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ployees of an ice manufacturing company which sent only about 6 percent of its output outside of the State; *Sun Pub. Co.* v. *Walling*, 7 Wage Hour Rept. 115 (C. C. A. 6, 1944) holding the Act applicable to employees of a newspaper, 2 to 3 percent of whose circulation was out of the State. And see *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88 where this Court held the employee entitled to recover under the Act on the ground that "*some* of the oil produced ultimately found its way into interstate commerce" (317 U. S. at 91) (italics supplied). "The Court did not say how much nor whether the amount made any difference" (*Berry* v. *34 Irving Place Corp.*, *supra*, 6 Wage Hour Rept., at 1230).

APPENDIX

FAIR LABOR STANDARDS ACT, 52 STAT. 1060 (29 U. S. C., SEC. 201 ET SEQ.)

Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

* * * * *

SEC. 3. As used in this Act—

* * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof. * * *

* * * * *

Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or

in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8.

* * * * *

Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

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